No. 94-1025

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE,

Petitioner,

v.

GOYA FOODS, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should certiorari be granted to review a decision made under the bankruptcy abstention statute, 28 U.S.C. § 1334(c), although the statute provides that a decision thereunder "is not reviewable . . . by the Supreme Court of the United States", and this provision was recently amended to eliminate any ambiguity that might formerly have existed as to its scope?

2. Should certiorari be granted to review a judgment directing a bankruptcy court to abstain from resolving a dispute and allow a state court to do so, when the dispute has now been substantially decided by the state court, so that review of the abstention decision would have little or no practical effect?

3. Should certiorari be granted at the request of a Petitioner who presented none of the contentions upon which he seeks review to any of the courts below?

4. Should certiorari be granted to review a decision that a bankruptcy court should abstain in favor of a state court, where the Petitioner's arguments that the bankruptcy court lacked power to abstain are unsupported by any relevant authority, there is no conflict of decisions, and the courts below applied well-settled standards in allowing state-law issues to be determined in the seven-year-old state-court action that had repeatedly been disrupted by Petitioner's improper forum-shopping tactics?

PARTIES TO THE PROCEEDING

The parties are identified in the petition for writ of certiorari. (Pet. ii).*

RULE 29.1 LISTING

Pursuant to Rule 29.1 of the Rules of this Court, Respondents state that none of the corporate Respondents has any parent corporations or subsidiaries (other than wholly owned subsidiaries), except as follows:

Respondent Goya Foods, Inc. is the corporate parent of Respondent Zolmar Realty Corp. In addition, Bison Canning Co., Inc., Cardet Wholesale Foods, Inc., and Cuban Portorrican American Products, Inc. are subsidiaries of Goya Foods, Inc.

Respondent Goya de Puerto Rico, Inc. is the corporate parent of Respondent Tradewind Foods, Inc.

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* Petitioner's enumeration of the parties includes Gerardo A. Quiros-Lopez, Esq., the trustee of Petitioner's estate in bankruptcy, as a party, but does not designate Mr. Quiros-Lopez as either a petitioner or a respondent in this Court. Under this Court's Rule 12.4, Mr. Quiros-Lopez is a respondent to the petition. However, as used in this Brief in Opposition, the term "Respondents" does not include Mr. Quiros-Lopez.

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OPINIONS BELOW AND JURISDICTION

The opinions below are set forth in the Appendix to the Petition. (Pet. 1a-33a). While Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), Respondents dispute this Court's jurisdiction on the grounds set forth under the Reasons for Denying the Writ.

STATUTES INVOLVED

28 U.S.C. § 1334. Bankruptcy cases and proceedings.[1]

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

[1] 28 U.S.C. § 1334 is set forth here in its form applicable to this case. The statute has since been amended by section 104(b) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4109, effective in all bankruptcy cases filed after October 22, 1994. The significance of this amendment is discussed *infra* under Point I of the Reasons for Denying the Writ.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive

jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

COUNTERSTATEMENT OF THE CASE

This petition continues several years of bitter litigation fomented by Petitioner, Charles Unanue, against various members of his family and family-owned companies. Petitioner has sought (1) an inheritance from his late father, who died in 1976 without leaving him any assets; and (2) the nullification of two settlement contracts that he executed in 1972 (the "1972 Agreement") and 1974 (the "1974 Amendment"), in which prior family litigation was resolved through Respondents' purchase of Petitioner's interests in the various companies for millions of dollars in cash.[2]

After years of litigation, the New Jersey Superior Court rejected Petitioner's inheritance and contract claims, on their merits, in November 1993. (*See infra*, pp. A-9-A-22).[3] Petitioner

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[2] Petitioner's Statement of the Case (Pet. 3-11) contains scurrilous allegations of wrongdoing, by Respondents and others, extending as far back as 1969. These allegations have little relevance to the parties' substantive inheritance and contract disputes, and none at all to the abstention issue on which Petitioner seeks certiorari. That being the case, Respondents will confine their Counterstatement to the *relevant* facts, including those bearing upon the issues that would be before this Court if certiorari were granted. (*See* Sup. Ct. R. 15.1.) Respondents' failure to respond to Petitioner's other allegations should not be deemed an admission of their correctness. In particular and without limitation, Respondents expressly deny Petitioner's allegations concerning "a massive tax fraud scheme," his description of the contents of the 1972 Agreement and 1974 Amendment, and his "estimates" of the value of his parents' estates.

[3] Since the contract issues as well as the inheritance issues have been heard and resolved in the New Jersey Action, Petitioner's representation that the parties' litigation since 1987 "has focused exclusively on Petitioner's claim to inherit his share of his parents' estates" (Pet. 3) is clearly inaccurate.

now asks this Court to hold that a federal bankruptcy court should have decided these issues, while entirely disregarding the fact that the state court has already decided them.

The New Jersey Action

Petitioner began this round of family litigation by asserting his inheritance claim in 1987. Upon receiving Petitioner's demand, his father's executors and trustees commenced a declaratory judgment action against Petitioner (the "New Jersey Action") in the Probate Part of the Superior Court of Bergen County, New Jersey, where the father's will had been probated 11 years before and a trust created by the father had long been administered. In addition to Petitioner's inheritance claim, the issues in the New Jersey Action included the validity of the 1972 Agreement and 1974 Amendment, under which Petitioner received more than $4 million in cash in return for surrendering his interests in the companies and agreeing, *inter alia*, never to contest his father's estate plan or to seek an inheritance from his father's estate or trust.

Since the inception of the New Jersey Action, Petitioner has engaged in a persistent and extraordinary series of obstructive tactics designed to thwart or delay its resolution. *See*, *e.g.*, *Unanue-Casal v. Unanue-Casal*, 132 F.R.D. 146, 148-49 (D.N.J. 1989) (describing some of Petitioner's abusive conduct), *aff'd without opn.*, 914 F.2d 244 (3d Cir. 1990). His avowed purpose has been to secure what he perceives to be a more favorable forum -- a court located in Puerto Rico, rather than the New Jersey state court -- to hear his inheritance and contract claims. Among other things, in 1987 and 1988, Petitioner filed two unnecessary, duplicative actions against Respondents in the Superior Court of Puerto Rico. The Puerto Rico courts have stayed these actions pending resolution of the New Jersey Action, while harshly criticizing Petitioner's improper claim-splitting and efforts to manipulate the judicial system.

Despite Petitioner's unremitting obstructionism, pretrial proceedings in the New Jersey Action were completed in the

spring of 1989, and trial on the domicile of Petitioner's father, an important issue in that action, was set to begin in July. Petitioner did not allow the trial to begin without a final burst of efforts to thwart it. Late in the afternoon of the business day before trial was to commence, Petitioner filed a manifestly frivolous petition to remove the two-year-old New Jersey Action from the New Jersey Superior Court to the United States District Court for the District of Puerto Rico, 1500 miles away. On the morning of trial, Petitioner again sought removal, this time in the District of New Jersey. These removal attempts -- jurisdictionally baseless, untimely, and improvident on their face -- were rejected by federal judges in both New Jersey and Puerto Rico, and Petitioner was sanctioned by both courts pursuant to Rule 11 of the Federal Rules of Civil Procedure, in orders affirmed by the First and Third Circuit Courts of Appeals, both because the removal petitions were objectively baseless and because

> [T]here [was] good reason to believe that [Petitioner] filed the removal petitions for "an improper purpose," namely, to harass, or to delay the start of the New Jersey trial. . . . [T]he filing of the removal petition, at the eve of trial, many months after the state court suit began, in a clearly improper forum, tended to undermine the goals that Rule 11 seeks to advance.

Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 842 (1st Cir. 1990) (Breyer, C.J.); *see also Unanue-Casal v. Unanue-Casal*, 132 F.R.D. at 150-51.

Petitioner's Bankruptcy

With the removal attempts rejected, and Petitioner's other last-ditch efforts to enjoin the proceedings also turned away, the lengthy New Jersey trial began on July 10, 1989. The trial had substantially concluded, and the parties were preparing their post-trial memoranda, when Petitioner filed a voluntary

Chapter 7 bankruptcy petition in the District of Puerto Rico on August 29, 1990.[4]

Petitioner promptly sought to transform his Puerto Rico bankruptcy case into "the central arena for the continued struggle among the Unanue brothers." (Pet. 6). He pursued this goal in two ways. First, after the bankruptcy filing automatically stayed the New Jersey Action under 11 U.S.C. § 362(a), Petitioner vigorously opposed his adversaries' attempts to obtain relief from that stay to permit the action to resume and be concluded. In February 1991, over Petitioner's objection, the bankruptcy court granted limited relief from the stay to permit the New Jersey court to resolve the domicile issue. In December 1991, the New Jersey court handed down a lengthy opinion squarely rejecting Petitioner's position on that issue and finding that Petitioner's father had been domiciled in New Jersey, as Respondents had contended, at all relevant times. *See Matter of Unanue*, 255 N.J. Super. 362, 605 A.2d 279 (Law Div. 1991) (opinion abridged for publication).

As another means to bring the litigation to the bankruptcy court, and thereby oust the jurisdiction of the New Jersey court, Petitioner insisted that his creditors file formal proofs of claim in the bankruptcy case before he would proceed with a court-ordered examination of his financial condition.

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[4] Petitioner's bankruptcy schedules recited that he owned negligible tangible assets, while he had liabilities of more than $1 million. This claim was, and remains, difficult to accept given Petitioner's receipt of more than $4.3 million in cash between 1972 and 1975 pursuant to the 1972 Agreement and 1974 Amendment, as well as several series of highly suspicious financial transactions to which Petitioner was a party, and the invocation by Petitioner and his wife of the Fifth Amendment privilege against self-incrimination when questioned concerning these transactions. *See Quiros-Lopez v. Unanue-Casal* (*In re* Unanue-Casal), 998 F.2d 28, 34 (1st Cir. 1993) (reviewing financial history of Petitioner and finding "reasonable 'likelihood of recovery' " on bankruptcy trustee's causes of action for Petitioner's allegedly fraudulent transfers of property), *aff'g* 144 B.R. 604 (D.P.R. 1992).

Because the 1974 Amendment had a prevailing-party attorneys'-fee clause, those Respondents who had borne the heavy legal bills created by Petitioner's baseless inheritance and contract claims would be entitled to recover their reasonable legal expenses from Petitioner *if* they ultimately prevailed in the pending actions, including the New Jersey Action. Accordingly, two of the Respondents filed contingent claims for estimated amounts of these expenses.[5] Thereupon, Petitioner filed objections to these attorneys'-fee claims, based principally on his contention that the claims must be invalid because the 1974 Amendment on which they were based was null and void in its entirety, and he demanded that the bankruptcy court rule on this state-law issue, although the identical issue had by then already been pending in the New Jersey Action for more than three years.

While Petitioner was misusing his bankruptcy filing to stall the New Jersey Action and provide him with a new Puerto Rico forum to adjudicate his contract invalidity argument, a series of highly unusual events was taking place within the bankruptcy case itself. In the summer of 1991, Petitioner caused his wife to purchase the claims of all the scheduled creditors who held liquidated, dischargeable debts, and to file an instrument waiving her entitlement to pursue any claim against the estate. Petitioner thus eliminated any colorable purpose that his bankruptcy case might have had, even as considered from the "debtor's" own point of view, except as a forum-shopping mechanism for him to use in the ongoing family litigation between himself and Respondents.

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[5] The Respondents who filed contingent proofs of claim for their estimated attorneys' fees and litigation expenses were Goya Foods, Inc. and Goya de Puerto Rico, Inc. None of the dozen other Respondents ever filed a proof of claim in Petitioner's bankruptcy case, nor did any of the other parties to the New Jersey Action do so.

The Relief-From-Stay Decisions

Soon after the New Jersey court held that Petitioner's father had been domiciled in that state, the plaintiffs in the New Jersey Action asked the bankruptcy court to grant further relief from the automatic stay to permit that action to be concluded. In an Opinion and Order dated May 15, 1992, the bankruptcy court denied this application. The plaintiffs appealed this ruling to the United States District Court for the District of Puerto Rico.

On August 3, 1993, the district court reversed the bankruptcy court's denial of relief from the stay, holding in a comprehensive opinion that the New Jersey state court was the proper forum for the parties' substantive disputes. *Unanue-Casal v. Unanue-Casal* (*In re* Unanue-Casal), 159 B.R. 90 (D.P.R. 1993). Petitioner's motion for an emergency stay was denied by the First Circuit Court of Appeals (Breyer, Selya and Cyr, JJ.) on November 16, 1993. (*Infra*, pp. A-1-A-3).

Demonstrating the appropriateness of vacating the stay, the New Jersey court was able to decide the merits of the parties' disputes within a few months after the stay was lifted. The court upheld Respondents' positions and rejected those of Petitioner, finding that both the 1972 Agreement and the 1974 Amendment were valid in their entirety, and that Petitioner had no inheritance rights to any of the assets he was seeking. (*See infra*, pp. A-9-A-22). Subsequently, the New Jersey court also held that under the 1974 Amendment, Petitioner is required to pay his adversaries' reasonable expenses and attorneys' fees incurred in the New Jersey Action.[6]

On May 12, 1994, the First Circuit (Selya, Coffin and Bownes, JJ.) issued a brief, unpublished *per curiam* opinion

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[6] Determination of the exact amount of the costs and attorneys' fees to be paid by Petitioner -- the last remaining issue in the New Jersey Action -- was referred to a special master for consideration. The master held an evidentiary hearing on this issue in August 1994, and his report is expected shortly.

pursuant to its Local Rule 27.1,[7] affirming the district court's decision to lift the stay. After describing Petitioner's "fierce tenacity" in the litigation as "misplaced," the First Circuit relied on "the district court's well-conceived opinion" in summarily affirming. *Unanue-Casal v. Unanue-Casal*, 23 F.3d 395 (1st Cir. 1994) (table) (*infra*, pp. A-4-A-7). On June 3, 1994, the First Circuit denied Petitioner's motion for rehearing, without opinion. (*Infra*, p. A-8). Petitioner did not seek review of the First Circuit's decision in this Court; his time to do so expired on September 1, 1994. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1.

The Abstention Decisions

Meanwhile, in March 1992, Petitioner filed a new "Amended Counterclaim" against Respondents in his bankruptcy case. This pleading renewed Petitioner's contentions that the 1972 Agreement and 1974 Amendment should be invalidated in their entirety, so that Petitioner should receive millions of dollars in damages as well as stock interests in all the family-owned companies, and also reasserted Petitioner's inheritance claims. Respondents asked the bankruptcy court to abstain from deciding the state-law issues presented by the Amended Counterclaim, and instead to allow them to be resolved in the New Jersey Action where they had already been pending for five years. *See* 28 U.S.C. § 1334(c)(1), (2).

By Opinion and Order dated November 20, 1992, the bankruptcy court refused to abstain from resolving the Amended Counterclaim, under either the "mandatory abstention" statute, 28 U.S.C. § 1334(c)(2), or the "discretionary abstention" statute, 28 U.S.C. § 1334(c)(1). (Pet.

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[7] Local Rule 27.1 of the Rules of the United States Court of Appeals for the First Circuit, entitled "Summary Disposition," provides that "[a]t any time, ...the court may...affirm and enforce the judgment or order below...if it shall clearly appear that no substantial question is presented."

20a-33a).[8] The grounds for the bankruptcy court's ruling were closely related to those that had grounded its denial of relief from the automatic stay six months earlier.

Respondents appealed to the district court, which again reversed.[9] *Goya Foods, Inc. v. Unanue-Casal* (*In re* Unanue-Casal), 164 B.R. 216 (D.P.R. 1993) (Pet. 3a-16a). The district court first held that the Amended Counterclaim was subject to mandatory abstention, finding that all the statutory prerequisites under § 1334(c)(2) were met. (164 B.R. at 221-22; Pet. 10a-12a). The court then continued: "We now turn to the question of discretionary abstention, and find that even were mandatory [abstention] not as clearly warranted as we find it is, that it was an abuse of the bankruptcy court's discretion not to abstain under the doctrine of discretionary abstention." (164 B.R. at 222; Pet. 13a). In reaching this conclusion, the district court relied upon a well-recognized list of factors relevant to discretionary abstention decisions,

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[8] More specifically, the bankruptcy court attempted to "sever" Petitioner's objection to the two proofs of claim from the other issues raised in the Amended Counterclaim. However, Petitioner's objection to claims was principally based on his assertion that the entire 1974 Amendment upon which the claims were based, as well as the antecedent 1972 Agreement, were null and void in their entirety -- a contention that, if accepted by the bankruptcy court, would have had consequences far more wide-ranging than disallowance of the claims. Moreover, since the claims represented attorneys' fees and legal expenses that would be owed by Petitioner only if Respondents won the New Jersey Action and other litigation, liquidating or estimating the claims could have required the bankruptcy court to examine the merits of all the substantive contract and inheritance issues involved in that litigation. Thus, despite Petitioner's emphasis on the supposedly limited issue the bankruptcy court had "severed" for consideration (*see* Pet. 8-9), in truth there would have been little, if any, practical difference between the bankruptcy court's resolving the "severed issue" it had identified and its resolving the entire series of contract issues raised by the Amended Counterclaim.

[9] Although the abstention appeal was ultimately assigned to the same district judge before whom the relief-from-stay appeal was pending (Chief Judge Gilberto Gierbolini of the District of Puerto Rico), the two appeals were docketed, briefed, and decided separately.

which the bankruptcy court had not analyzed. (164 B.R. at 221; Pet. 13a). The court also quoted from its earlier relief-from-stay decision with regard to (1) the interests of judicial economy that would be served by allowing the New Jersey Action to proceed; (2) "the New Jersey court's familiarity with the entire history of this festering family fiasco"; (3) the lack of interference that would be caused to the bankruptcy case by abstention; and (4) Petitioner's evident misuse of the bankruptcy process as a means of forum-shopping. (164 B.R. at 222-23; Pet. 14a-16a, citing 159 B.R. at 98-102).

Petitioner, in turn, again appealed to the First Circuit. On August 5, 1994, that court (Selya, Coffin and Bownes, JJ.) issued an unpublished, one-paragraph *per curiam* opinion, again pursuant to its Local Rule 27.1, holding that "[e]ssentially for the reasons stated by the district court in its opinion, we find that the bankruptcy court abused its discretion in declining to abstain pursuant to 28 U.S.C. § 1334(c)(1)." *Goya Foods, Inc. v. Unanue-Casal*, 32 F.3d 561 (1st Cir. 1994) (table) (Pet. 1a).[10] On September 9, 1994, the court of appeals denied Petitioner's motion for rehearing, without opinion. (Pet. 19a). Petitioner filed this petition for certiorari on December 8, 1994.

REASONS FOR DENYING THE WRIT

For several reasons -- all ignored in the petition -- this case is not suitable for review on certiorari.

First, this Court lacks jurisdiction over the petition because Congress has specifically precluded this Court's review of bankruptcy abstention decisions under 28 U.S.C. § 1334(c).

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[10] Because it found that abstention was appropriate under § 1334(c)(1), the First Circuit did not address the district court's conclusion that abstention was also required under the mandatory abstention statute, § 1334(c)(2). Petitioner's attempt to infer legal conclusions about what the First Circuit "recogniz[ed]" based on its failure to reach the mandatory abstention issue (Pet. 10) is baseless.

Second, virtually all the substantive disputes between Petitioner and Respondents have already been resolved in the New Jersey Action, so that the forum-selection issue raised by Petitioner is substantially moot, and revisiting it at this point would serve no meaningful purpose.

Third, Petitioner's contentions are all unpreserved for this Court's review because he did not present any of his current arguments in any of the courts below, and many of them do not even relate to the abstention decisions whose review Petitioner is seeking.

Fourth, even apart from all these jurisdictional and procedural concerns, this case involves no issue worthy of this Court's attention. Petitioner has identified no conflict in decisions among the lower courts, no violation of any principle announced in a prior decision of this Court, no unsettled and important legal issue calling for this Court's resolution, and no departure from the "accepted and usual course of judicial proceedings" below. *See* Sup. Ct. R. 10.1. To the contrary, although Petitioner argues that abstention was improper here as a matter of law, he has not cited a single relevant authority to that effect, nor has he offered any cogent policy argument for the rule he seeks. At its heart, this case simply involves the application of well-recognized standards for discretionary abstention, as authorized by statute, to the particular, highly unusual circumstances of a single bankruptcy case.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S ABSTENTION DECISION

Petitioner contends that the bankruptcy court should not have been directed to abstain. Abstention in bankruptcy proceedings is expressly authorized by 28 U.S.C. § 1334(c), which provides for two types of abstention: *discretionary* abstention "in the interest of justice, or in the interest of comity with State courts or respect for State law," 28 U.S.C.

§ 1334(c)(1), and *mandatory* abstention when certain statutory prerequisites are satisfied, 28 U.S.C. § 1334(c)(2).

At least since 1990, decisions on abstention have been made by the bankruptcy court (rather than the district court) in the first instance. *See* 1991 Advisory Committee Note to Fed. R. Bankr. P. 5011(b). The bankruptcy court's decision is subject to one level of appellate review in the district court. *Id.*; *see, e.g., Farm Credit Bank v. Bott* (*In re* Stigge), 167 B.R. 961, 965 (Bankr. D. Kan. 1994). However, Congress has determined that beyond the district court level, further appellate review of these procedural decisions is not warranted: too much time should not be spent determining *which court* should decide a substantive dispute, at the expense of expeditiously resolving the merits of the dispute itself. *See Chemical Bank v. Togut* (*In re* Axona Int'l Credit & Commerce Ltd.), 924 F.2d 31, 35 (2d Cir. 1991); *see also Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (similar rationale as to nonreviewability of remand orders under 28 U.S.C. § 1447(d)); *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991). Accordingly, after setting out the discretionary and mandatory abstention doctrines, the abstention statute (in the form applicable to this case) provides:

> Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1334(c)(2). If this proscription of review applies here -- that is, if the decisions below to abstain were "made under this subsection" -- then this Court lacks jurisdiction.

This nonreviewability provision appears in 28 U.S.C. § 1334(c)(2), the same paragraph of § 1334 that contains the mandatory abstention provision. Accordingly, this Court clearly may not review a mandatory abstention decision. *Cf. In re Parque Forestal, Inc.*, 949 F.2d 504, 511 n.8 (1st Cir.

1991) (dismissing appeal from denial of mandatory abstention pursuant to § 1334(c)(2)). Here, the district court relied on mandatory abstention as one ground for ordering the bankruptcy court to abstain. That mandatory abstention order, unreviewable by the court of appeals or this Court, will remain intact irrespective of any disposition that might be made here of Petitioner's discretionary abstention arguments, and will independently bar the bankruptcy court from taking up Petitioner's Amended Counterclaim. Under these circumstances, Petitioner's present attack on the discretionary abstention decisions is entirely academic, and this Court lacks jurisdiction over it for that reason.

Even if this case involved *only* discretionary abstention under 28 U.S.C. § 1334(c)(1), this Court would still lack jurisdiction. To be sure, the statutory proscription of review (in the form applicable to this case) is arguably ambiguous as applied to discretionary abstention, because the sentence barring review appears in § 1334(c)(2) and not in § 1334(c)(1). However, § 1334(c)(2) bars this Court's review of an abstention "decision . . . made under *this subsection*" -- not "this paragraph." As used in the United States Code, the word "subsection" refers to a principal, lettered subdivision of a section of the Code.[11] Thus, the reference in 28 U.S.C.

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[11] For example: 28 U.S.C. § 1334 is a "section" of the Code; section 1334 is divided into four "subsections" lettered (a), (b), (c) and (d); and subsection (c), in turn, is divided into two "paragraphs" numbered (1) and (2). The words "subsection" and "paragraph" are consistently used in this manner throughout the Code, including title 11 (the Bankruptcy Code) and title 28 (the Judicial Code). In particular, the words are so used in all the other provisions of title 28 that were added or rewritten by the Bankruptcy Amendments and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which enacted § 1334(c). *See, e.g.*, 28 U.S.C. §§ 152(a)(1), 157(c)(2). The consistent usage of a term in "numerous provisions" within a particular statute is significant evidence of its intended meaning elsewhere in that statute. *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1447-48 (1994). *See also* L. Filson, *The Legislative Drafter's*

(Footnote continued)

§ 1334(c)(2) to a "decision . . . made under this subsection" refers to "subsection (c)" in its entirety -- even though subsection (c) is, in turn, divided into the two paragraphs (1) and (2) -- and thus refers to discretionary as well as mandatory abstention. The two courts that have noted the significance of the word "subsection" in this context have reached precisely this conclusion. *In re Stigge*, 167 B.R. at 965 & n.3; *Gallo v. Herpich* (*In re* Cemetery Dev. Corp.), 59 B.R. 115, 127-28 & n.32 (Bankr. M.D. La. 1986).[12] Hence, given its words' ordinary meaning, the nonreviewability language of 28 U.S.C. § 1334(c)(2) applies to abstention decisions under either paragraph of "this subsection" (c).

Accordingly, the petition for certiorari must be denied or dismissed for want of jurisdiction. At a minimum, the Court would have to expend substantial efforts resolving the jurisdictional issue before it could take up the issues Petitioner seeks to present -- efforts that there is no reason to expend because Congress has recently amended 28 U.S.C.

Desk Reference §§ 20.3, 24.9 (1992) (discussing designation of Code provisions); D. Hirsch, *Drafting Federal Law* § 5.16 (2d ed. 1989) (same).

[12] *Accord Adams v. Sidney Schafer & Assocs., Inc.* (*In re* Adams), 809 F.2d 1187, 1190 (5th Cir. 1987) ("The [district] court . . . had authority to abstain pursuant to § 1334(c)(1), hence its reasoning is not for us to review or reconsider."). There is some court of appeals authority to the contrary, holding that appellate review of discretionary abstention decisions is permitted. *Ben Cooper, Inc. v. Insurance Co. of Pa.* (*In re* Ben Cooper, Inc.), 924 F.2d 36, 38 (2d Cir.), *cert. denied*, 500 U.S. 928 (1991); *Coker v. Pan American World Airways, Inc.* (*In re* Pan American Corp.), 950 F.2d 839, 843-44 (2d Cir. 1991); *California State Board of Equalization v. Sierra Summit, Inc.* (*In re* China Peak Resort), 847 F.2d 570, 572 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 844 (1989). However, in none of these cases did the courts of appeals consider the meaning of the word "subsection" as used in § 1334(c)(2), as discussed above. Nor did any of these cases scrutinize the drafting history of the 1984 amendments to the statute, which provides strong confirmatory evidence of Congress' intent that both discretionary and mandatory abstention decisions be nonreviewable by the courts of appeals and this Court.

§ 1334 in a way that will prevent the arguable ambiguity present in this case from ever recurring. *See* Bankruptcy Reform Act of 1994, Pub. L. 103-394, sec. 104(b), 108 Stat. 4106, 4109 (removing nonreviewability language from same paragraph as mandatory abstention provision and instead placing it in a separate subdivision). Although the amendment does not apply retroactively to this case, *see id.*, sec. 702(a), 108 Stat. at 4150, its enactment eliminates any arguable need for authoritative construction of the former provision (a task for which this case would have provided a strikingly poor vehicle in any event). *See* R. Stern, E. Gressman *et al.*, *Supreme Court Practice* 172 (7th ed. 1993); *cf. Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994) (certiorari is not granted to address an issue that will not recur in any other case).

Because this Court lacks jurisdiction, the petition for certiorari must be denied or dismissed.

II. BECAUSE THE NEW JERSEY SUPERIOR COURT HAS RESOLVED THE MERITS OF THE PARTIES' DISPUTE, THE ABSTENTION ISSUE IS LARGELY ACADEMIC

Although Petitioner grudgingly concedes that "the New Jersey action . . . is proceeding" (Pet. 11), the petition is grossly misleading in its failure to mention the key rulings that have been issued since that litigation resumed in 1993, or the effect they might have on the issues presented for review. In fact, as detailed above, the New Jersey court has already resolved substantially all of the parties' substantive inheritance and contract disputes. (*See infra*, pp. A-9-A-22). In doing so, the New Jersey court rejected almost all the very same factual and legal contentions that Petitioner asserted in his bankruptcy court Amended Counterclaim, including his contention that the 1974 Amendment was invalid, and held that Respondents are entitled to an award of litigation expenses and attorneys' fees pursuant to that contract.

The New Jersey court's rulings have substantially reduced the importance of the abstention issue in this case. Petitioner's contention that the 1974 Amendment was invalid (and therefore could not support a claim for attorneys' fees), contained in his Amended Counterclaim, has now been ruled on and rejected in New Jersey. Since the New Jersey state court's determinations are binding on the bankruptcy court, *see, e.g., Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991) (collateral estoppel principles are fully applicable in bankruptcy); *First Jersey National Bank v. Brown* (*In re* Brown), 951 F.2d 564, 570-71 (3d Cir. 1991), Petitioner's assertion that the bankruptcy court should have been allowed to decide the contract's validity in the first instance is no longer a live issue.[13] The relative unimportance of the abstention decision to the ultimate outcome of the parties' disputes, given the current procedural posture, provides ample basis for denying the writ.[14]

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[13] The only remaining issue raised by Petitioner's objection to claims -- the precise *amount* of the expenses and attorneys' fees that Petitioner must pay to Respondents -- is now under consideration in the New Jersey Action with a decision expected shortly. Following resolution of that issue, Petitioner will have the right to appeal the New Jersey Superior Court's rulings. That review must, of course, be sought within the New Jersey state appellate system, and not in a bankruptcy court or any other federal court. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (lower federal courts cannot sit in review of state court decisions); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). Under New Jersey practice, the pendency of appellate proceedings would not suspend the finality of the trial-court judgment for issue-preclusion purposes, in a bankruptcy court or elsewhere. *In re Brown*, 951 F.2d at 568-70.

[14] Even if the New Jersey court had not yet resolved the merits of this case and substantially mooted the abstention dispute, Petitioner's failure to seek this Court's review of the automatic stay decision would substantially limit the scope of review available on his present petition for review of the abstention decision. The district court's discussion of discretionary abstention relied heavily on its analysis in its relief-from-stay opinion issued four months earlier. This was perfectly appropriate, because the essential

(Footnote continued)

III. PETITIONER FAILED TO PRESENT ANY OF HIS ARGUMENTS IN THE COURTS BELOW

The principal contention of the petition for certiorari is that a bankruptcy court may *never* exercise its express statutory authority to abstain from resolving a state-law dispute if a party to the dispute has filed a proof of claim in the bankruptcy case, because the statute erects "an absolute bar to the exercise of discretion under 28 U.S.C. § 1334(c)(1) to abstain" under these circumstances. (Pet. 16). The first three of Petitioner's four arguments for the writ are all variations on this theme. (Pet. 11-17).

Petitioner's challenge to the legality of the discretionary abstention decision should not be considered because Petitioner failed to present his present theory to any of the courts below. Insofar as they dealt with abstention under § 1334(c)(1), Petitioner's briefs in both the court of appeals and the district court argued only that the bankruptcy court had properly exercised its *discretion* by declining to abstain. Petitioner has never before argued that there exists "an absolute bar to the exercise of discretion" applicable in this case, nor has he ever cited a large majority of the authorities on which he now relies in any of his prior discussions of discretionary abstention.[15]

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question in both cases was which court should hear and resolve the parties' substantive disputes. Once the district court (affirmed by the court of appeals) found that the New Jersey Superior Court should hear and decide the issues, it inexorably followed that the bankruptcy court should not hear and decide the very same issues, and should therefore abstain.

[15] *See Goya Foods, Inc. v. Unanue-Casal*, No. 94-1065, Brief of Debtor-Respondent-Appellant ("Pet. 1st Cir. Br.") at 27-30 (1st Cir. May 23, 1994); *id.*, Reply Brief of Debtor-Respondent-Appellant at 11-17 (July 18, 1994); *Goya Foods, Inc. v. Unanue-Casal*, No. 94-2909 (GG), Appellee's Brief on Appeal (D.P.R. Feb. 19, 1993).

For example, Petitioner framed the question before the First Circuit as "[w]hether the bankruptcy court's decision to deny [Respondents'] motion for abstention was clearly erroneous and an abuse of its discretion" (Pet. 1st Cir. Br. at 2), and he asserted that the abstention decision should be reviewed under the deferential "abuse of discretion" standard because "the factors that are supposed to dominate the decision cannot be evaluated by the reviewing court [and] the decision is supposed to be made on the basis of subjective rather than objective factors -- the individual judgment of the judge . . . rather than some articulable legal standard. . . ." *Id.* at 27, *quoting Mosey Mfg. Co., Inc. v. NLRB*, 701 F.2d 610, 615 (7th Cir. 1983) (en banc). This description is diametrically opposed to the view Petitioner now presents: that the filing of proofs of claim by two Respondents automatically barred them from asking the bankruptcy court to abstain.

It has long been this Court's salutary practice not to consider issues and arguments that went unpresented in the lower courts. *See* R. Stern, E. Gressman *et al.*, *Supreme Court Practice* § 6.26 (7th ed. 1993). It is particularly inappropriate for a petitioner to seek certiorari where his arguments in this Court not only are unpreserved, but are flatly inconsistent with the arguments that were presented below. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 & n.2 (1989). And it is extraordinarily inappropriate for Petitioner to invoke this Court's certiorari jurisdiction to avoid "erroneous precedent" (Pet. 14) on an allegedly "important issue" (Pet. 11), after contending in the court of appeals that "uniformity among decisions is not important" on the discretionary abstention issue. Pet. 1st Cir. Br. at 27, *quoting Mosey*, 701 F.2d at 615.

Petitioner's final argument is that he was somehow denied due process because the district court's relief-from-stay and abstention decisions contain language critical of Petitioner. (Pet. 18-20). This contention, too, is entirely unpreserved: Although Petitioner challenges some findings

contained in the district court's abstention opinion, he never presented his due process argument to the court of appeals. Petitioner's briefs in the First Circuit abstention appeal did not even mention the due process clause or the Fifth Amendment. Even more seriously, most of the findings to which Petitioner objects (*see* Pet. 17; *see also* Pet. 9-10) were not made in this case at all: they are found in the district court's relief-from-stay opinion, not its abstention opinion. As noted above, Petitioner never sought this Court's review in the relief-from-stay case, and his time to do so has long since expired. Petitioner's attacks on the abstention opinion are thoroughly intertwined with his criticism of the earlier decision, which is not, and cannot be brought, before this Court. Certiorari should not be granted where the Court's review would be so unduly restricted.

IV. PETITIONER'S CONTENTIONS RAISE NO SIGNIFICANT LEGAL ISSUE WORTHY OF CONSIDERATION BY THIS COURT

Even if this Court had jurisdiction and if the case presented one or more live issues properly preserved for review, Petitioner has failed to demonstrate any "special and important reasons" that this Court should grant review. *See* Sup. Ct. R. 10.1.

A. THE DECISION TO ABSTAIN REPRESENTED A ROUTINE EXERCISE OF DISCRETION

Petitioner argues that it was improper as a matter of law to direct the bankruptcy court to abstain in this case, irrespective of all the other factors that overwhelmingly counseled in favor of abstention, because two Respondents had filed proofs of claim. Petitioner's attempt to eliminate an entire category of proceedings from the bankruptcy court's statutory authority to abstain is entirely unsupported either by authority or by bankruptcy policy. Far from being constrained

by rigid rules such as the one proposed by Petitioner, 28 U.S.C. § 1334(c)(1) was intended to vest courts with wide discretion to evaluate all relevant factors before deciding whether to abstain, not to make any single factor dispositive.

The plenary scope of the discretion to abstain with which § 1334(c)(1) vests the courts was noted in a case relied on by Petitioner himself. *Wood v. Wood* (*In re* Wood), 825 F.2d 90 (5th Cir. 1987) (Pet. 13, 16). In *Wood*, Judge Wisdom explained his view that federal bankruptcy jurisdiction should be interpreted broadly, even though situations would arise where it would be inappropriate to exercise that jurisdiction at the expense of a state court, because the bankruptcy court would have the ability to abstain from any unwarranted exercise of jurisdiction:

> The district court expressed its concern that an overbroad interpretation of [28 U.S.C.] section 1334 would bring into federal court matters that should be left to state courts to decide. We have also expressed the same concern. There is no necessary reason why that concern must be met by restrictive interpretations of the statutory grant of jurisdiction under section 1334. The Act grants the district court *broad power* to abstain *whenever* appropriate "in the interest of justice, or in the interest of comity with State courts or respect for State law." The abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case.

Id. at 93 (emphasis added; citations omitted). No *per se* rules are to be found in the abstention statute or elsewhere limiting the circumstances under which "the discretionary exercise of abstention" would be "appropriate in a particular case."

Although the courts have been applying the discretionary abstention provisions of 28 U.S.C. § 1334(c)(1) and its predecessor, former 28 U.S.C. § 1471(d), to a great variety of bankruptcy situations for more than fifteen years, the statute has provided no difficulties of management or administration in the bankruptcy and district courts that would require guidance from this Court. The courts have evolved a list of 12 factors relevant to discretionary abstention, first enumerated in *Republic Reader's Service, Inc. v. Magazine Service Bureau, Inc.* (*In re* Republic Reader's Service, Inc.), 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987), widely followed throughout the country, *see, e.g., In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993); *Christensen v. Tucson Estates, Inc.* (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990), and firmly grounded in "common sense." *Swift v. Bellucci* (*In re* Bellucci), 119 B.R. 763, 772 (Bankr. E.D. Cal. 1990). The district court's decision herein, affirmed by the court of appeals, was based in large measure on the application of these factors. (164 B.R. at 222; Pet. 13a, citing *Flores Rivera v. Telemundo Group*, 133 B.R. 674, 677 (D.P.R. 1991)).

Indeed, for all the many reasons set forth by the district court, affirmed by the court of appeals, in both their relief-from-stay and abstention decisions, this represents a paradigmatic example of a case in which abstention is warranted "in the interest of justice, [and] in the interest of comity with State courts [and] respect for State law", to allow a series of state-law issues to be resolved in a state-court case that had been pending and actively litigated for several years before the bankruptcy case and Amended Counterclaim were filed. Under circumstances like these, courts routinely lift the automatic stay of the state-court case under 11 U.S.C. § 362, and abstain from themselves deciding the identical issues to be decided by the state court. Indeed, in such a case, it is a reversible abuse of discretion for the bankruptcy court to fail to defer to the state court by lifting the stay and abstaining. *See, e.g., In re Brown*, 951 F.2d at 570; *In re Tucson Estates*, 912 F.2d at 1166-70; *Pursifull v. Eakin*, 814 F.2d 1501, 1505-06 (10th Cir. 1987).

Notwithstanding these elementary principles and their obvious applicability to this case, Petitioner asserts that the filing of proofs of claim by two Respondents automatically precluded abstention. He cites *no authority of any kind* for this view -- not a single decision of any bankruptcy court, district court or court of appeals, much less of this Court. *A fortiori*, there is no conflict of decisions on this issue. Even the bankruptcy court here, while declining to abstain, had no doubt about its discretion to do so. (*See* Pet. 29a-31a).

To be sure, bankruptcy courts will frequently choose to scrutinize objections to proofs of claim themselves. However, this practice has a "*well-recognized* exception": "when the claim under challenge is unliquidated or contingent, . . . if the claim under consideration is already being litigated in a non-bankruptcy forum, and the litigation could be speedily resolved without undue delay of the administration of the estate, it is appropriate for the Bankruptcy court to abstain...." *In re Bicoastal Corp.*, 158 B.R. 237, 240 (Bankr. M.D. Fla. 1993) (emphasis added). In other words, "[t]he fact that the dispute arises in the context of an objection to claim does not preclude abstention." *In re Denton*, 161 B.R. 987, 988 n.2 (Bankr. E.D. Ark. 1993) (abstaining under § 1334(c)(1) from resolving objection to proof of claim). Where, as here, resolution of an unliquidated claim depends upon a determination of state-law issues and a state-court judgment would provide a basis for allowing or disallowing the claim, the "*clearest case*" for abstention is presented. *Southmark Prime Plus, L.P. v. Southmark Storage Assocs. Ltd. Partnership* (*In re* Southmark Storage Assocs. Ltd. Partnership), 132 B.R. 231, 233 (Bankr. D. Conn. 1991) (emphasis added), *quoting Williams v. Associates Finance, Inc.* (*In re* Williams), 88 B.R. 187, 189 (Bankr. N.D. Ill. 1988). Or, as stated in a seminal abstention case:

> Where a claim asserted against an estate involves legal issues in which state law predominates, a claim can be litigated in state court to the

> point of judgment, with enforcement of the judgment stayed until further order of the bankruptcy court. *This result follows even though a formal proof of claim . . . has been filed against the estate.*

In re Republic Reader's Service, 81 B.R. at 426 (emphasis added).

In view of these cases, Petitioner's contention that the First Circuit's decision in this case has "carve[d] out . . . an entirely new exception to bankruptcy jurisdiction" (Pet. 11) is simply false. Far from representing an "entirely new" departure from ordinary bankruptcy procedure, the decision to abstain was a routine, fact-bound application of "well-settled" principles to the "clearest case" for a decision to abstain.

Petitioner's arguments to the contrary are (in the words of the First Circuit in a related context) "mere makeweights" to support the result he seeks. (*See infra*, p. A-5). First, Petitioner's reliance on 11 U.S.C. § 502(b), which directs the bankruptcy court to "adjudicate" proofs of claim, is clearly misplaced. (Pet. 14-16).[16] Section 502 has nothing to do with the choice-of-forum issues raised by a motion to abstain. All the cases relied upon by Petitioner in his § 502(b) argument either are irrelevant -- failing even to mention the abstention statute -- or they strongly support Respondents' position. *See Gardner v. New Jersey*, 329 U.S. 565, 583-84 (1947) (Pet. 13) (recognizing bankruptcy court's authority to abstain from addressing state-law issues raised by claim asserted against bankruptcy estate, citing *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940)); *In re Wood*, 825 F.2d at 92-93

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[16] As the cases discussed above hold, it is entirely proper for the bankruptcy court to "adjudicate" an unliquidated claim by allowing its validity and amount to be determined in a state court of appropriate jurisdiction, and then according appropriate *res judicata* effect to the resulting state-court judgment. *See, e.g., Heiser v. Woodruff*, 327 U.S. 726 (1946); *Montalvo v. Banco Comercial de Mayaguez* (*In re* Montalvo), 157 B.R. 510 (D.P.R. 1993); *In re Republic Reader's Service*, 81 B.R. at 426-27; *In re Pitts*, 31 B.R. 90, 92 (Bankr. N.D. Ga. 1983).

(Pet. 13, 16) (discussing "broad power" of bankruptcy court to abstain); *In re Nova Real Estate Inv. Trust*, 23 B.R. 62, 65-66 (Bankr. E.D. Va. 1982) (Pet. 14) ("estimating" claim pursuant to 11 U.S.C. § 502(c) to provide *interim* valuation for inclusion in reorganization plan, but noting prior decision to remand case to state court and lift automatic stay so that creditor could "proceed to liquidate his claim in the Florida [state] court").[17]

Similarly, Petitioner's second argument, that a creditor's filing of a proof of claim should automatically constitute a waiver of the right to seek abstention, is unsupported. (Pet. 14-16).[18] Once again, Petitioner offers no authority that the law is to this effect -- it clearly is not -- and no reason that it should be. Finally, Petitioner's third argument for the writ is a re-statement adding nothing to the earlier arguments. (Pet. 16-17).

The decision to abstain in this case broke no new ground: the district court, affirmed by the court of appeals, simply

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[17] The language on which Petitioner relies in *In re Wood*, 825 F.2d at 96-97, and *Gulf States Exploration Co. v. Manville Forest Products Corp.* (*In re* Manville Forest Products Corp.), 896 F.2d 1384, 1389-90 (2d Cir. 1990) (Pet. 13), dealt with the jurisdictional distinction between "core" and "non-core" matters under 28 U.S.C. § 157(b). Here, the district court properly held the dispute to be a "non-core," "related to" proceeding. (164 B.R. at 221; Pet. 10a-12a). In any event, while the status of a proceeding as core or non-core may be dispositive on a motion for mandatory abstention under 28 U.S.C. § 1334(c)(2), Petitioner properly concedes that discretionary abstention under § 1334(c)(1) can be ordered even in a core proceeding (Pet. 16), so that this issue is irrelevant here.

[18] In this regard, the cases relied on by Petitioner (*see* Pet. 14-15) indicate that a bankruptcy court will usually have *jurisdiction* to evaluate a proof of claim filed in a case before it. However, this principle has nothing to do with discretionary abstention: In seeking discretionary abstention, a party concedes (at least *arguendo*) that the bankruptcy court *has* jurisdiction, but asserts that "in the interest of justice, . . . comity with State courts or respect for State law," the court should refrain from *exercising* its jurisdiction. Cases addressing parties' constitutional rights to a trial before a jury, or before a court created under Article III (*see* Pet. 14-15), define the bounds of bankruptcy court jurisdiction; they in no way cabin the court's discretion to abstain.

applied a series of recognized standards to a particular, somewhat unusual factual setting, and determined that abstention was appropriate. Petitioner has offered no good reason for this Court to grant certiorari to review that determination.

B. PETITIONER'S DUE PROCESS CLAIM IS ALSO MERITLESS

As his final argument in support of certiorari, Petitioner alleges that he was denied due process because the district court, affirmed by the court of appeals, made findings of fact with which he disagrees. (Pet. 17-18). As noted above, Petitioner has not only failed to preserve this argument, but he offers it in the wrong case, so that his request for certiorari is meritless on its face.

A grant of certiorari to consider Petitioner's belated due process argument would also be inappropriate for a further procedural reason: the opinions below strongly suggest that the result would have been identical even if those findings of which Petitioner complains were stripped away. In lifting the stay and ordering the bankruptcy court to abstain, the district court relied heavily on many other factors germane to requests for those forms of relief, many of which are described above. The cumulative weight of these factors, discussed at length in the district court's relief-from-stay opinion (159 B.R. at 96-100) as well as its abstention opinion (164 B.R. at 222-23; Pet. 13a-15a), makes it clear that the district court would have reached the same results even if it had not found, as it properly did, that Petitioner's bankruptcy case was filed for improper purposes and was a sham.

Once again, however, even if Petitioner had properly preserved his claims and even if their resolution would affect the result of the case, Petitioner's due process argument is without substance, for there was no abridgement of Petitioner's procedural rights in the nearly four years of relief-from-stay and abstention litigation. Petitioner's cursory (three-page) due process argument offers no precedent or

policy to support its contention that a testimonial hearing (which Petitioner never even asked for in the abstention proceedings) would be required before a court may determine to abstain, pursuant to statutory authority, so as to allow another court to adjudicate substantive issues on their merits.

In deciding the relief-from-stay and abstention matters, the role of the courts below was neither to rule on Petitioner's entitlement to economic relief under the Bankruptcy Code, nor to finally adjudicate the disputes between Petitioner and Respondents. The courts were simply asked to select the court that *would* ultimately resolve the parties' inheritance and contract law contentions: Petitioner contended that the bankruptcy court should rule on the parties' state-law disputes, while Respondents contended that the long-pending New Jersey Action represented the appropriate forum to resolve them.

When called on to choose between these positions, it was entirely appropriate for the courts below to consider, as one relevant factor, whether Petitioner's bankruptcy appeared to be a legitimate bankruptcy case filed and maintained in good faith. The automatic stay under 11 U.S.C. § 362(a) acts as an injunction against the further pursuit of claims against a debtor, and where state-court litigation is involved, constitutes a rare exception to the Anti-Injunction Act, 28 U.S.C. § 2243. Petitioner's invocation of the bankruptcy court's authority to adjudicate claims similarly had the effect of ousting the state court's jurisdiction to do so in a long-pending action. These preemptions of state-court authority generally serve legitimate and important purposes for the benefit of debtors and creditors, but they cannot be justified in cases that are filed or maintained in bad faith for the primary purpose of obtaining a forum-shopping advantage, rather than the "breathing spell" and "fresh start" contemplated by the Bankruptcy Code.

The district court's view that Petitioner's did not appear to be a legitimate bankruptcy case was supported by compelling facts. *First*, the financial circumstances of the filing were

dubious on their face: Petitioner had failed to offer any reasonable accounting of the $4.3 million in cash he had received under the 1972 Agreement and 1974 Amendment, he had engaged in a pattern of highly suspicious transactions with his wife and a dummy Panamanian corporation over a period of years, and he asserted the Fifth Amendment privilege against self-incrimination at his opening examination in the bankruptcy case. *Second*, even assuming *arguendo* that the petition had been filed in good faith in the first instance, any need for bankruptcy protection evaporated less than a year later, when Petitioner's wife purchased all the liquidated, dischargeable claims against his estate and agreed not to pursue them. *Third*, the bankruptcy case was obviously being misused as a forum-shopping device. The petition was filed on the eve of a critical determination in the New Jersey Action, three full years into the litigation, by a litigant whose past record left little doubt about his willingness to use every conceivable means to obstruct and delay that action, so as to relocate the venue for his claims to a court located in Puerto Rico -- first the Puerto Rico local courts, later the United States District Court, and now the bankruptcy court.

In the absence of actual debts that Petitioner sought to discharge, the only purpose Petitioner could be seeking through his bankruptcy case was to gain an automatic stay of the New Jersey Action that represented the parties' appropriate forum, while simultaneously obtaining the Puerto Rico forum he had long sought. Tactics such as these are disfavored under any circumstances. *See, e.g., Barclay's American/Business Credit, Inc. v. Radio WBHP, Inc.* (*In re* Dixie Broadcasting, Inc.), 871 F.2d 1023, 1027 (11th Cir.), *cert. denied*, 493 U.S. 853 (1989); *Packerland Packing Co., Inc. v. Griffith Brokerage Co.* (*In re* Kemble), 776 F.2d 802, 806-07 (9th Cir. 1985). Given Petitioner's grotesque record of unabated misconduct throughout the family litigations, now in their eighth year, the time had certainly come to put an end to them once and for all.

In resolving the abstention application (like the earlier relief-from-stay application), the district court and the court of appeals properly questioned the *bona fides* of Petitioner's bankruptcy case in the course of ruling against him. However, contrary to Petitioner's suggestions (*see* Pet. 18), the findings contained in the abstention decision have *not* resulted in dismissal of his bankruptcy petition, the denial of his discharge, or the denial of dischargeability of any debt. Rather, the abstention decision had only one legal consequence: it confirmed that plenary adjudication of the parties' *substantive* disputes -- of which Petitioner has completely lost sight amidst all his procedural jockeying -- would take place in the New Jersey Action rather than the bankruptcy court. In this context, Petitioner should not be heard to urge that *more* than three and one-half years of proceedings were required before the threshold forum-selection issues could be resolved, particularly in view of Congress' commands that relief-from-stay and abstention applications are to be resolved promptly and with a minimum of delay. *See* 11 U.S.C. § 362(e); 28 U.S.C. § 1334(c)(2) (now § 1334(d)).

Petitioner concedes that this Court rarely reviews a claim of "an injustice perpetrated on a single litigant," and that that is all his due process argument represents. (Pet. 17, 19). Here, even Petitioner's individual claim of injustice rings utterly hollow given the nature of the issues, the thoroughness of the proceedings below, the clear correctness of the results reached, and the failure to raise the due process claim at any previous stage of the abstention proceedings. Certiorari should be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

January 9, 1995

APPENDIX

Decisions Of The First Circuit Court of Appeals In The Relief-From-Stay Proceeding*

UNITED STATES COURT OF APPEALS

FOR THE

FIRST CIRCUIT

No. 93-2186

JOSEPH A. UNANUE, *et al.*,

Appellees,

v.

ULPIANO UNANUE-CASAL a/k/a CHARLES UNANUE,

Appellant.

Before

Breyer, *Chief Judge*,
Selya and Cyr, *Circuit Judges*.

ORDER OF COURT

Entered November 16, 1993

Movant/appellant Ulpiano Unanue-Casal moves for a stay pending appeal, pursuant to Fed. R. App. P. 8, of the district court order lifting the stay on proceedings in the New Jersey Superior Court. We deny the motion.

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* [Set forth here are the decisions of the First Circuit Court of Appeals in Petitioner's appeal from the "relief-from-stay" decision of the district court reported at 159 B.R. 90 (D.P.R. 1993). Petitioner did not seek this Court's review of any of these rulings.]

First, for the reasons stated by the district court in its opinion dated August 3, 1993, movant has not established a sufficiently strong likelihood of success on the merits. Movant's contention that the district court erred in not remanding the case to the bankruptcy court after it found that appellees had met their *prima facie* burden of proof is not convincing. Before making its decision concerning the lifting of the stay in the New Jersey action, the bankruptcy court had already decided that the only evidence that movant proffered at the bankruptcy hearing was irrelevant. Since all relevant evidence was before both the bankruptcy and the district courts, a remand would serve no useful purpose. We also note that the record strongly suggests that the movant has been manipulating the bankruptcy process to avoid determination of the merits of the underlying dispute. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 847 (1st Cir. 1987) (affirming decision granting relief from automatic stay without any testimonial hearing on ground that debtor was misusing bankruptcy protection to avoid decision on merits of dispute).

Second, movant has failed to establish that he would suffer any irreparable harm if the stay is not granted. Denial of the stay would only allow the New Jersey action to proceed.[1] Movant has a right to participate in that action and to avail himself of the state appellate process should he so choose. Being required to litigate in state court rather than bankruptcy court does not constitute irreparable harm. *In re Thomases*, 28 B.R. 961, 962-63 (Bankr. S.D.N.Y. 1983). Nor

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[1] Movant's contention that his interests will not be represented in the New Jersey action because the bankruptcy trustee is unwilling or unable to appear is without merit. The New Jersey court has indicated that it would permit movant to appear on his own behalf. As the district court wrote, and as the record amply supports, movant "has demonstrated no problems hiring numerous lawyers and law firms for all of his suits."

is the fact that movant's appeal in this court may be mooted by the New Jersey action a basis for a stay without a showing that a stay is otherwise appropriate. *See Ramsdell v. G.H. Coffey Co.*, 632 F.2d 162 (1st Cir. 1980) (denying stay pending appeal, even though case may become moot, since there was no other showing of entitlement to extraordinary relief). Movant has made no such showing here.

Movant's request for oral argument is *denied.* Movant's request for a stay pending appeal is *denied.*

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE

FIRST CIRCUIT

No. 93-2186

IN RE ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE,

Debtor.

JOSEPH A. UNANUE, *et al.*,

Petitioners, Appellees,

v.

ULPIANO UNANUE-CASAL
a/k/a CHARLES UNANUE,

Respondent, Appellant.

Appeal from the United States District Court
for the District of Puerto Rico

[Hon. Gilberto Gierbolini, *U.S. District Judge*]

Before

Selya, *Circuit Judge,*

Coffin and Bownes, *Senior Circuit Judges.*

Per Curiam. This is the latest chapter in a dispute that has been litigated with fierce tenacity by the debtor, Ulpiano Unanue-Casal, a/k/a Charles Unanue. *See, e.g., In re Unanue-Casal,* 998 F.2d 28 (1st Cir. 1993); *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839 (1st Cir. 1990). Although tenacity is to be admired, it is sometimes misplaced. So it is here.

We have carefully reviewed the voluminous record and the parties' briefs, and have duly considered the matters raised at oral argument. In the end, we are persuaded that the district court did not err in reversing the bankruptcy court's refusal to lift the automatic stay, 11 U.S.C. § 362. The district court's well-conceived opinion, *see In re Unanue-Casal*, Civ. No. 92-1796 GG (D.P.R. Aug. 3, 1993) (unpublished) [now reported at 159 B.R. 90], adequately elucidates the reasoning that is controlling on the central issue presented by this appeal, and no useful purpose would be served by rehearsing that reasoning. Similarly, we see no basis for a remand to the bankruptcy court for further exploration of this issue. And, finally, appellant's other arguments are mere makeweights.

We need go no further. Because this appeal presents no substantial question of law or fact, we summarily affirm the judgment below.[1]

Affirmed. See 1st Cir. Loc. R. 27.1

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[1] We take no view of appellees' claim that the appeal is moot, as the appeal is impuissant in any event.

UNITED STATES COURT OF APPEALS

FOR THE

FIRST CIRCUIT

No. 93-2186

IN RE: ULPIANO UNANUE-CASAL,
aka CHARLES UNANUE,

Debtor.

JOSEPH A. UNANUE, *et al.*,

Petitioners, Appellees,

v.

ULPIANO UNANUE-CASAL
aka CHARLES UNANUE,

Respondent, Appellant.

JUDGMENT

Entered: May 12, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment is affirmed.**

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE

FIRST CIRCUIT

No. 93-2186

JOSEPH A. UNANUE, *et al.*,

Appellees,

v.

ULPIANO UNANUE-CASAL a/k/a CHARLES UNANUE,

Appellant.

ORDER OF THE COURT

Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
Coffin, *Senior Circuit Judge*.
Entered: June 3, 1994

Upon consideration of appellant's petition for rehearing,

It is ordered that the said petition be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk

November 19, 1993 Opinion and Order of the New Jersey Superior Court

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIV.: BERGEN COUNTY DOCKET NO. M-128817

November 19, 1993
Hackensack, New Jersey

BEFORE:

THE HONORABLE ARTHUR J. LESEMANN, J.S.C.

ORAL OPINION OF THE COURT*

THE COURT: We've had argument now that has gone on for close to two hours. I have here in my hand that I'm holding the briefs and appendices that were submitted in connection with the present proceeding, that being only, of course, a small fraction of what is really involved in this case.

As I read all of this material I had the strange feeling that we were almost over-intellectualizing something that seems relatively simple. * * * I think to an extent there has been something of an over-intellectualization of this matter. And I

* [The court delivered its opinion orally at the conclusion of argument on cross-motions for summary judgment. Immaterial typographical errors in the court reporter's transcript have been corrected.]

don't mean to be critical when I say that because I understand why. The Unanue family, I would think, should be shell-shocked by this time. * * *

We begin with a trust agreement and a Will in 1970 and, of course, that preceded by actions in 1969 involving the removal of Charles Unanue by Prudencio.

Now, whether the present difficulties had a genesis even before that, I don't know. In 1972, 21 years ago, it seemed as though the matters which had torn the family apart had been settled by comprehensive agreements that called for Charles to be paid 4.5 million dollars. Well, I guess the ink hardly dried before everybody was going around again in 1973, and then in July 1974 we had the agreement which some people have spoken about so much here today.

It's difficult for me to conceive of how anyone could make the language of the 1974 agreements any broader, definitive and all-inclusive than they were. To begin with, the agreement began by a reference to a desire to finish these matters once and for all. The agreement, of course, sets out payments of substantial monies to Charles Unanue, something over four million dollars.

In Section 6.03, which is entitled "Covenant not to Contest Disposition of Property by Prudencio Unanue." That is the language I referred to. Charles covenants and agrees -- read the next language -- for the benefit of the companies, the additional companies, Charles' brothers, Prudencio and their estates, heirs, beneficiaries, et cetera -- he agrees for the benefit of all of those entities, he irrevocably disclaims, renounces any and all interest he may have or may hereafter have in the assets or estate of Prudencio Unanue, whether under any will, trust, by intestacy, by virtue of relationship, by other operation of law or otherwise.

It's an exercise in legalese, designed to see whether there is any conceivable word that one could think of that's not covered in this, and I think whoever wrote it passed the test. You can't think of anything else you could put in there to make it any more inclusive than that.

If you move on after the beginning portions of 6.03, you come to extraordinary provisions, subparagraphs A and B. These say -- well, subparagraph A starts this way: In the event that Charles receives in any way, any stock or interest in any of the companies, he agrees to immediately sell it. And there is a provision for fixing the price.

Subparagraph B contains another provision. If in any way Charles gets any stock or any interest in these companies, he's going to sell it immediately back to the company.

In other words, in no way whatsoever is he to have any ownership in the companies, nor, of course, is he to have any claim to any interest that Prudencio had or Prudencio's estate had.

Then in Section 6.08 we have the covenant not to sue which is really a repetition of what I already said, and Charles agreed that he would forever refrain from instituting and prosecuting any suit against the company, Charles' brothers, Prudencio, any of their estates.

It's difficult to understand why, in the light of that kind of language, and the receipt of four million dollars, we should even be here today. I confess that after I heard of Judge Kole's decision on the domicile question, my conclusion, my initial conclusion was that this matter was now finished. And I assumed I would have some formal document or other to sign, but surely the only issues in the case were now put to rest.

I understood the original claim didn't seem to me to have much merit, but I understood the claim that if Prudencio was indeed a domiciliary of Puerto Rico at the time of the trust and at the time of his death, then Puerto Rican law would govern the trust and the Will. Puerto Rican law, I was told, had the forced heirship concept, and if Puerto Rican law governed, then that entire settlement was subject to being set aside.

And, of course, it's a familiar principle that we live with that normally it's law of the place where one is domiciled at the time of death governs his Will.

Well, as we know in a decision that went for over 100 pages, which is some sort of record in terms of trial time in this courthouse, 147 pages, Judge Kole found that both critical times, the date of the trust and the date of the death, Prudencio was, and for many, many years, had been a domiciliary of New Jersey.

Now, of course, we have another contest. We have a contention that, in essence, Prudencio cheated his wife out of her interest in the * * * [c]onjugal partnership, and what we have is Charles Unanue flatly and unequivocally challenging Prudencio's right to dispose of his assets as he chose to do.

How one can justify that in view of the express language of the 1974 agreements in which Charles agreed in about eight different ways never to do that, is beyond me.

I am satisfied, without any question or reservation, that Charles Unanue is barred by the 1974 agreements from even raising the attack based on the alleged deprivation of his mother by his father.

Frankly, it's a little difficult to listen to claims of "fraud on my mother" to use Charles Unanue's language, and Mrs. Unanue is not here claiming this fraud and to pretend to

accept the fiction that in some way Charles Unanue is defending the rights of his mother or is concerned about a fraud on his mother is, of course, absurd.

The claim is being submitted as a method by which Charles Unanue is attempting to do precisely what he agreed in 1974 that he would never do. And, of course, we have the fact that in 1974 Charles Unanue was paid something over four million dollars in consideration for his promise not to do that.

The presentation of a few moments ago in which Mr. Unanue talked about economic duress was, frankly, mind boggling. I have never quite heard anybody say that he really didn't get much because it's almost a quote to say he netted a little over two million dollars which, quote, "lasted a few years." That's a difficult concept to accept. It's particularly difficult if it's being submitted as a basis for my refusing to enforce this agreement or my finding some form of economic duress.

The argument as to why I should not enforce the 1974 agreement, of course, is based on the claim that I should apply Puerto Rican law. The claim is that the Puerto Rican law would invalidate the 1974 agreement. I find absolutely no basis on which I should apply -- for me to apply Puerto Rican law to invalidate the 1974 agreement.

First of all, there is a clear provision in that agreement that the parties agree that the agreement shall be governed by New York law.

Now, on the face of things, I see no reason whatsoever why I should decline to enforce that. Admittedly, there could be circumstances when such a freely negotiated choice of law provision might be ignored by a court. There could conceivably be circumstances which so strongly argue for application of the law of some other jurisdiction that a judge

might say that notwithstanding the parties' selection of the law of one state, I will not apply that. That is clearly not this case. There are clearly, and without contradiction, substantial contacts with the State of New York in addition to contacts with the State of New Jersey.

Certainly Goya Foods was a key part of that entire agreement. Goya was a New York corporation. Goya was primarily located in the State of New York. Excuse me. The corporation was located in New York. Mr. Unanue himself was at that time a domiciliary of New Jersey, not New York but certainly a state with a body of law virtually identical with that of New York as concerns the issues of which we're talking.

There was litigation in the federal courts of New York which was being settled and resolved by this agreement. So clearly there were significant contacts with the State of New York.

Further, we have the policy of this forum state. I am sitting in a court in New Jersey and I cannot ignore the policy of this state. If it were clear, unambiguous and the reasons were compelling as to why I had to apply the law of Puerto Rico, of course I would do so, but to do so would certainly violate some strong, important precepts of the law of this state and to apply the law of New York would not violate those precepts.

One of the strong precepts of the law of this state is that when one freely enters into an agreement and enjoys the benefits of that agreement, one should not be free many years later to attempt to renounce that agreement, to attempt to set aside the agreement and to renege on all of the obligations that one has undertaken under that agreement, particularly when one has received some four million dollars.

Another strong precept of the policy of this state is the right of any domiciliary of this state to dispose of his assets as he sees fit.

Now, an essential part of that 1974 agreement and a critical part of it was the undertaking of Charles Unanue not to challenge Prudencio's right to exercise that New Jersey right that one has to dispose of one's assets as one chooses.

Were I to apply Puerto Rican law, I would also have to set aside, if I accept Mr. Unanue's argument, that strongly held principle of this state.

It would be difficult to conceive of or create an argument to set aside this agreement if one did it in 1975, 1976, 1977. To do it in 1986 or 1987 is virtually impossible. We heard Mr. Unanue address the question of why he delayed in launching this attack, and frankly, the reasons, stated simply, didn't constitute any reasons.

He contended, and I'm sure it's true, that Goya Foods and Mr. Unanue's brothers had substantial assets, and I discount the statement about political influence. I don't know what that means. Certainly they had assets, but so did Mr. Unanue. He had four million dollars worth of assets and if he were determined to attack this agreement, even if he only had two million dollars left after paying the other bills, that certainly would have financed a proper attack on the agreement.

It was interesting that one of the other reasons -- incredibly as it seems, incredibly as it sounds -- one of the reasons why he didn't launch an earlier attack, he said, was because he would have had to pay back the money. That I find mind boggling. Of course he would have had to pay back the money. That's exactly the point and that's exactly why a court should be extremely reluctant to entertain any attack such as this at this time.

Claims of duress, in short, are submitted in conclusory language without any substance whatsoever. Claims of fraud are submitted on the same basis.

I note, incidentally, that much of the argument that was submitted this afternoon by Mr. Unanue were based on statements not in the record, statements which were not even included in the brief that was submitted. I chose to accept them but many of them are simply without foundation.

I am satisfied that at all relevant times, as Judge Kole found, from 1929 on, Prudencio Unanue was a domiciliary of this state. I am satisfied, without any question, that the applicable law which governs disposition of assets is not the law that was in effect in a state where one married many years before.

Rather, the argument submitted by Mr. Griffinger in his brief is correct. It is virtually the unanimous rule in this country, and just about every state I guess that has considered the issue, in all of the treatises and the Restatement of Conflict of Laws, that the law that governs the ownership of assets is the law of the state one lives in, one is a domiciliary of, at the time one acquires the asset.

Simply because Prudencio and Carolina were married in Puerto Rico in the 1920's or before, does not mean that the law of Puerto Rico governs their acquisition of assets for the rest of their lives. Similarly, the fact that they were citizens of Spain at that time certainly does not govern their acquisition of assets for the rest of their lives.

As noted, Prudencio was a domiciliary of this country and the state of New Jersey since at least 1929. There is no indication that the assets in question were received before 1936. One could take 1936 as a base year in view of the bankruptcy of Prudencio, and certainly the acquisition of

assets thereafter while Prudencio was a domiciliary of New Jersey is governed by the law of New Jersey.

Those assets did not become subject to conjugal partnership laws of Puerto Rico simply because the couple had been married there many years before but were no longer domiciliaries of Puerto Rico.

I'm also satisfied that even if one were to apply the law of Puerto Rico under the case discussed and analyzed in the reply brief submitted by the beneficiaries, and one were to apply the tests set out in the *Toppel* case in which one seeks the greatest contacts with the transaction, the most rational conclusion is that the law of New Jersey and not that of Puerto Rico would determine whether assets were or were not subject to conjugal partnership laws of Puerto Rico.

The two parties, Carolina and Prudencio, were domiciliaries of New Jersey. Their business was primarily located in New York or New Jersey. They had become citizens of the United States. They were not domiciliaries of Puerto Rico and therefore, even under that test, I would find again that the law of New Jersey rather than that of Puerto Rico applies.

In view of all of the foregoing, I will sign an order first approving the accounting that has been submitted. The accounting was satisfactory and is approved.

The only challenge to the accounting is based on the arguments of Charles Unanue which I have already addressed and if there are some that I neglected to address, let me just note that I have considered them, I have not overlooked them, and it's only because of the very broad approach that was submitted by Mr. Unanue this afternoon that I may overlook specific comment on some of them.

With respect to all of the arguments submitted, I am satisfied they are without merit. None should stand in the way or will stand in the way of my approval of the accounting.

I'm satisfied that the 1974 agreement is valid, is enforceable. I'm satisfied that all of the attacks on that agreement, all of the attacks on the trust that precedes the 1974 agreement -- the 1970 trust that is -- or any attack on the disposition provisions of the Will of Prudencio Unanue, if there was any of that, all of them are without merit and must be rejected.

Claims of fraud, conspiracy, duress are all rejected as being without merit.

The assets with which we are concerned are not subject to the law of Puerto Rico concerning conjugal partnership. They are subject to the laws of this state which, of course, do not include that concept.

The 1974 agreement, as I've said, not only bars Charles Unanue's attacks, direct attacks on the trust, on the Will, or any other disposition by Prudencio. It also bars the challenge clothed in an attack seeking to enforce rights of the late Mrs. Unanue. That is nothing more than an indirect method of attempting to accomplish what Charles Unanue is barred from doing directly.

I have a form of order that was submitted.

* * *

[The court then signed the Order set forth on the next page.]

In the Matter of the Settlement of the Accounts of JOSEPH UNANUE and FRANK UNANUE, Trustees Under the Trust Agreement Dated November 16, 1970, as Amended, By and Among PRUDENCIO UNANUE, as Grantor, and PRUDENCIO UNANUE, JOSEPH UNANUE and ANTHONY UNANUE, as Trustees of Sixteen Trusts Thereunder.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIV.: BERGEN COUNTY DOCKET NO. M-128817

Civil Action

ORDER

This matter having been opened before the Court on the joint application of the Trustees, the Beneficiaries, the guardian *ad litem* for Jorge Unanue, and Goya Foods, Inc., and the Court having directed the submissions of all interested parties in accordance with its Order dated October 15, 1993, and a hearing having been held before the Court on November 19, 1993 with the attorneys for all parties to this action appearing, to wit, Quirk & Gallagher, attorneys for the Trustees (N. Patrick Quirk, Esq., appearing); Crummy, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for the Beneficiaries (Michael R. Griffinger, Esq., appearing); Durkin & Boggia, Esqs., guardian *ad litem* for Jorge Unanue (Martin T. Durkin, Esq., appearing); Saiber Schlesinger Satz & Goldstein, attorneys for Goya Foods, Inc. (David M. Satz, Jr., Esq., appearing); and Charles Unanue appearing *pro se*; and the Court having heard

and considered oral argument, and having read and considered all the papers and exhibits submitted;

IT IS on this 19th day of November, 1993:

ORDERED, that the Second Accounting of Joseph Unanue and Frank Unanue, Trustees under the Trust Agreement dated November 16, 1970, as submitted with the Verified Complaint and as supplemented and amended through and including June 30, 1993, be and hereby is approved as filed; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue and the bankruptcy estate of Charles Unanue, each had and has no right whatsoever to receive any assets from Prudencio Unanue's estate or from the Trust created by Prudencio Unanue on November 16, 1970, or from any of the follow-on trusts created under said Trust; it being specifically found that the fifty-three (53) shares of Goya Foods, Inc. stock placed into said Trust by Prudencio Unanue and administered under the Trust Agreement were solely the property of Prudencio Unanue and were properly included in the Trust and that Charles Unanue and the bankruptcy estate of Charles Unanue have no interest therein, direct or indirect; and it is

FURTHER ORDERED, that the final paragraph of this Court's Order of December 7, 1987 and paragraph 5 of this Court's Order of January 4, 1988 are hereby vacated; and it is

FURTHER ORDERED, that the Trustees are hereby expressly authorized and directed to distribute forthwith from the follow-on trusts the property interests of each Beneficiary in each such trust to such Beneficiaries as have attained the age of twenty-five (25) years; and it is

FURTHER ORDERED, that on Charles Unanue's Amended Counterclaim against Joseph Unanue, Frank Unanue *et al.*, as corrected by letter dated January 5, 1990, judgment be and hereby is entered in favor of the counterclaim defendants and against Charles Unanue on the merits of said Counterclaim; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the "Amendment dated July 31, 1974 to Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies," and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that the contract known as the "Agreement dated June 9, 1972 for Sale of Interests of Charles Unanue in Goya Foods, Inc. and Affiliated Companies" (except insofar as it was expressly modified or superseded by the 1974 Amendment), and each and every provision thereof, was and is valid and enforceable and that Charles Unanue and the bankruptcy estate of Charles Unanue each are bound thereby; and it is

FURTHER ORDERED, that this Court finds, determines and declares that Charles Unanue has materially breached and continues in material breach of the 1974 Amendment by reason of his violations of Sections 6.02, 6.03, 6.04 and 6.08 thereof in this action and in other litigations, and the Court reserves jurisdiction for the purpose of determining the appropriate remedy or remedies for Charles Unanue's breach of contract; and it is

FURTHER ORDERED, that Charles Unanue's Cross-Motion dated November 8, 1993 for the relief requested therein be and it hereby is denied in its entirety; and it is

FURTHER ORDERED, that on defendant Charles Unanue's Counterclaim against Goya Foods, Inc. *et al.* judgment be and it hereby is entered in favor of the counterclaim defendants and against Charles Unanue on the merits of said Counterclaim.

/s/ ARTHUR J. LESEMANN, J.S.C.